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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the matter of:

Westinghouse Electric Corporation

RESPONDENT

Proceeding Under Sections 104, 106,
and 122 of the Comprehensive
Environmental Response, Comp-
ensation, and Liability Act of 1980
(42 U.S.C. §§ 9604, 9606, and 9622),
as amended by the Superfund
Amendments and Reauthorization
Act of 1986.

U.S. EPA Docket
No. 92-08

ADMINISTRATIVE CONSENT ORDER

FOR REMEDIAL DESIGN

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1 I. AUTHORITY

2
3 A. This Consent Order is entered into pursuant to the
4 authority vested in the President of the United States by Sec-
5 tions 104, 106 and 122 of the Comprehensive Environmental
6 Response, Compensation, and Liability Act of 1980 (as amended by
7 the Superfund Amendments and Reauthorization Act of 1986)
8 ("CERCLA"), 42 U.S.C. §§ 9604, 9606, and 9622. The President
9 delegated this authority to the Administrator of the United
10 States Environmental Protection Agency ("EPA" or "Agency") by Ex-
11 ecutive Order 12580, 52 F.R. 2923. The Administrator of EPA fur-
12 ther delegated this authority to the Assistant Administrator for
13 Solid Waste and Emergency Response and to the Regional Ad-
14 ministrators by EPA Delegation Nos. 14-8-A and 14-14-C. This
15 authority has been redelegated to the Director, Hazardous Waste
16 Management Division, EPA, Region 9.

17
18 B. Without the admission or finding of any liability or of
19 any issue of fact or law, and solely for the purpose of the entry
20 and implementation of this Consent Order, Westinghouse Electric
21 Corporation ("Westinghouse") consents to this Consent Order, and
22 consents to and agrees not to contest EPA's jurisdiction to enter
23 into and enforce this Consent Order.

II. STATEMENT OF PURPOSE

In entering into this Consent Order, the mutual objectives of EPA and Westinghouse are:

A. To conduct the Remedial Design ("RD") work necessary for implementation of the selected remedy, including the work described in the Remedial Design Work Plan ("RD Work Plan"), a copy of which is attached as Appendix A and is incorporated herein by this reference. The Remedial Design work will also include researching, analyzing and specifying the activities necessary for implementation of the selected remedy as documented in the Record of Decision ("ROD") dated October 16, 1991 for the Westinghouse Superfund Site as defined in Section III.A below. A copy of the ROD is attached as Appendix B and is incorporated herein by this reference. The RD Work Plan specifies work to be performed during the Remedial Design, including, among other things, monitoring well placement, ground water sampling, treatability studies, pumping and aquifer tests and other investigatory work needed to properly design the implementation of the selected remedy. It also includes a list of reports, documents, and other deliverables, including plans and designs for implementing the soil and groundwater cleanup, that Westinghouse will provide for EPA approval, disapproval or modification.

B. To accomplish all actions required by the terms and conditions of this Consent Order in accordance with the provisions

1 of CERCLA and the National Contingency Plan ("NCP"), 40 C.F.R.
2 Part 300 et seq., as amended.

3
4 III. FINDINGS OF FACT

5
6 A. The Westinghouse Superfund Site ("Site") includes
7 Westinghouse's Marine Division Sunnyvale Plant ("the Plant") and
8 all areas in which the contamination from the Plant identified in
9 the ROD comes to be located. The Plant currently manufactures
10 steam generators, marine propulsion systems, and missile launch-
11 ing systems for the U.S. Department of Defense. The Plant is lo-
12 cated at 401 E. Hendy Avenue in the City of Sunnyvale, Santa
13 Clara County, California and is situated on 75 acres of in-
14 dustrially developed land. The Plant is bounded by California
15 Avenue to the north, Hendy Avenue to the south, North Sunnyvale
16 Avenue to the west and North Fair Oaks Avenue to the east.

17
18 B. Westinghouse acquired the original plant property in
19 1947 and continued expanding this property until 1965. The Wes-
20 tinghouse Sunnyvale Plant initially manufactured products which
21 included circuit breakers and transformers. In 1964, the Marine
22 Division was established at Sunnyvale. It assumed exclusive
23 responsibility for designing, manufacturing, testing and servic-
24 ing marine products.

25
26 C. During the mid-1950s, Westinghouse manufactured trans-
27 formers containing Inerteen as a dielectric fluid. Inerteen was

1 the Westinghouse trade name for an askarel consisting primarily
2 of Aroclor 1260, a polychlorinated biphenyl ("PCB") and
3 trichlorobenzene ("TCB"). An above-ground Inerteen storage tank
4 and underground pipelines located near an emergency water supply
5 reservoir for fire safety, Reservoir 2, were used to supply the
6 manufacturing operations. Inerteen had also been used for weed
7 control around the perimeter of the property and along railroad
8 spurs on the property.

9
10 D. In 1981, Westinghouse initiated a study to determine the
11 nature and extent of PCB in soils at the Site. Investigation
12 results indicated the presence of PCB in shallow soils in several
13 areas. Shallow soils in areas outside of the Reservoir 2 area,
14 along the railroad spurs and fencelines, were remediated under
15 Regional Water Quality Control Board ("RWQCB") Orders 84-63 and
16 85-94 in 1984 and 1985. The Reservoir 2 area was set apart for
17 more extensive investigation, because leaks from the former Iner-
18 teen storage tank and pipelines presented a more complex problem
19 in that PCB contamination extended through the vadose zone into
20 the shallow aquifers. Other groundwater contaminants identified
21 in the groundwater near Reservoir 2 were fuel hydrocarbons and
22 related compounds that had leaked from nearby underground fuel
23 storage tanks on the Westinghouse property.

24
25 E. The Westinghouse Superfund Site was proposed for listing
26 on the Federal Superfund National Priorities List ("NPL") in Oc-
27 tober 1984 and the listing was finalized in June 1986. From 1981

1 to 1987, the RWQCB was the lead agency for the Site. On December
2 18, 1987, EPA assumed the lead role for overseeing the remainder
3 of the activities at the Site. An Administrative Order on Con-
4 sent for the performance of a Remedial Investigation and
5 Feasibility Study ("RI/FS") was signed by Westinghouse and the
6 EPA on August 20, 1988.

7
8 F. The Remedial Investigation defined the extent of con-
9 tamination sufficient to evaluate cleanup alternatives and to
10 select a cleanup plan. Soils near the former Inerteen storage
11 tank and supply pipelines are contaminated with PCB. Con-
12 taminants of concern include fuel compounds, Inerteen compounds
13 and volatile organic compounds. A more complete description of
14 the contaminants of concern is provided in the ROD.

15
16 G. The Remedial Investigation indicated that there are no
17 current exposures occurring due to contact with any of the con-
18 taminants of concern at the Site. Risks associated with poten-
19 tial exposure to the contaminants of concern in soil and
20 groundwater at the Site have been estimated as stated in the ROD,
21 5.0, Summary of Site Risks.

22
23 H. The RI/FS has been completed and a Record of Decision
24 signed on October 16, 1991. The selected remedy addresses risks
25 posed by both soil contamination and groundwater contamination.

1 IV. CONCLUSIONS OF LAW

2
3 A. The Site is a "facility" as defined in Section 101 (9)
4 of CERCLA, 42 U.S.C. § 9601 (9).
5

6 B. Westinghouse is a "person" as defined in Section 101
7 (21) of CERCLA, 42 U.S.C. § 9601 (21).
8

9 C. The contaminants of concern at the Site identified in
10 the ROD are "hazardous substances" as defined in Section 101 (14)
11 of CERCLA, 42 U.S.C. § 9601(14).
12

13 D. The past, present, and potential migration of hazardous
14 substances from the Site constitutes an actual or threatened
15 "release" as defined in Section 101(22) of CERCLA, 42 U.S.C.
16 § 9601(22).
17

18 E. Westinghouse is a potentially responsible party pursuant
19 to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
20

21 V. DETERMINATIONS

22
23 A. The actual or threatened release of hazardous substances
24 from the Site may present an imminent and substantial endanger-
25 ment to the public health or welfare or the environment.
26

27 B. The actions required by this Consent Order are necessary
28

1 to protect the public health, welfare and the environment.

2
3 VI. WORK TO BE PERFORMED
4

5 All response work performed pursuant to this Consent Order
6 ("Work") shall be under the direction and supervision of a
7 qualified Project Management Consultant. Prior to initiation of
8 the Work, Westinghouse shall notify EPA in writing of the name,
9 title, and qualifications of such Project Management Consultant
10 and key employees thereof to be used in carrying out the terms of
11 this Consent Order. The qualifications of such persons undertak-
12 ing the Work for Westinghouse shall be subject to EPA's review,
13 for verification that such persons meet EPA's minimum technical
14 background and experience criteria. If EPA disapproves of any
15 such persons, EPA shall do so in writing and shall specify the
16 reasons for such disapproval, and Westinghouse shall notify EPA
17 within 30 days of receipt of the written notice, of the identity
18 and qualifications of the replacement(s). If EPA subsequently
19 disapproves of any replacement(s), EPA reserves its right under
20 CERCLA and the NCP to conduct the Work, and to seek reimbursement
21 for associated costs from Westinghouse.
22

23 A. Westinghouse shall perform the tasks and submit reports
24 contained in the RD Work Plan contained in Appendix A. Westin-
25 ghouse shall also, in addition to the reporting requirements con-
26 tained in the RD Workplan, submit Monthly Progress Reports, on
27 the 15th of each month, to be submitted beginning in March 1992,
28

1 and Quarterly Groundwater Monitoring Reports, three months after
2 each quarterly sampling event required by the RD Work Plan.
3 Either EPA or Westinghouse may request a reevaluation of the
4 groundwater monitoring program on a periodic basis, and, follow-
5 ing such reevaluation, EPA may require that the program be ad-
6 justed. All such Work shall be conducted in accordance with At-
7 tachment A, CERCLA, the NCP, and all applicable EPA guidance.
8 Deliverables to be submitted by Westinghouse, other than Monthly
9 Progress Reports and Quarterly Groundwater Monitoring Reports,
10 are listed in the Work Plan. The Workplan also includes a
11 schedule for performing the Remedial Design activities and the
12 submittal of deliverables. All draft deliverables must contain
13 sufficient information to allow for EPA's detailed technical
14 review and comment. Failure to submit sufficient information
15 will be deemed a failure to submit that draft deliverable. Any
16 reports, plans, specifications, schedules, and attachments re-
17 quired by this Consent Order are, upon approval by EPA, incor-
18 porated into this Consent Order, by this reference. Any non-
19 compliance with such EPA-approved reports, plans, specifications,
20 schedules, and attachments shall be considered a violation of
21 this Consent Order and will subject Westinghouse to stipulated
22 penalties in accordance with Section XII (Stipulated Penalties)
23 of this Consent Order. For the purposes of this Consent Order,
24 "day" means calendar day unless otherwise specified in this Con-
25 sent Order.

26
27 B. EPA shall approve, disapprove and/or modify each
28

1 deliverable submitted by Westinghouse under this Consent Order,
2 except for the Health and Safety Plan. In the event of disap-
3 proval and/or modification, EPA shall so notify Westinghouse in
4 writing and shall specify the reasons for such disapproval and/or
5 modification. Westinghouse shall revise disapproved documents
6 and submit required modifications to EPA as promptly as possible,
7 but not later than thirty (30) days after receipt of the notice
8 of disapproval and/or required modifications, unless a shorter
9 time is required by an approved work plan or schedule or an ex-
10 tension is given by EPA in writing, in which case such deadlines
11 shall apply.

12
13 C. If, during the performance of the Work, Westinghouse en-
14 counters unanticipated or changed circumstances which are ex-
15 pected to impact the schedule for performance of the Work or sub-
16 mittal of any deliverable, or which may render any prior
17 deliverable inaccurate, incomplete or incorrect, Westinghouse
18 shall notify the EPA Project Coordinator by telephone within 48
19 hours of the discovery of such unanticipated or changed cir-
20 cumstances.

21
22 D. EPA may determine that additional tasks, including, but
23 not limited to, investigation work, engineering evaluation, in-
24 terim response measures or tasks added in response to public com-
25 ment are necessary for implementation of the selected remedy in
26 the October 16, 1991 ROD. Subject to Section XI of this Consent
27 Order (Dispute Resolution), Westinghouse agrees to implement any

28

1 such additional tasks which EPA determines are necessary as part
2 of the RD. The additional work shall be completed in accordance
3 with the standards, specifications, requirements, and schedules
4 determined or approved by EPA.

5
6 E. All documents, including progress and technical reports,
7 approvals, disapprovals, and other correspondence to be submitted
8 pursuant to this Consent Order, shall be sent to the following
9 addressees or to such other addressees as the parties hereafter
10 may designate in writing, and shall be deemed submitted on the
11 date received by EPA or Westinghouse.

- 12
13 1) Two copies of all documents to be submitted to EPA shall
14 be sent to:

15 Helen McKinley
16 Remedial Project Manager (H-6-3)
17 Hazardous Waste Management Division
18 U.S. EPA, Region 9
19 75 Hawthorne Street
20 San Francisco, CA 94105
21 (415) 744-2236

22 One copy of each deliverable shall be sent to each of
23 the following addressees:

- 24 1. EPA's Contractor
25 2. California Regional Water Quality Control Board
26 3. California Environmental Protection Agency
27 4. City of Sunnyvale
28 5. Santa Clara Valley Water Management District

EPA shall provide the exact addresses for the five addressees
listed above within one week of the effective date of this Con-
sent Order.

1 2) Documents to be submitted to Westinghouse shall be sent
2 to:

3
4 Eric Manges
5 Project Manager
6 Environmental Affairs
7 Westinghouse Electric Corporation
8 11 Stanwix Street
9 Pittsburgh, PA 15222
10 (412) 642-3284

11 VII. DESIGNATED PROJECT COORDINATORS

12 A. EPA hereby designates the following person as Project
13 Coordinator who shall have the authorities, duties, and respon-
14 sibilities vested in the Remedial Project Manager by the National
15 Contingency Plan:

16 Helen McKinley
17 Remedial Project Manager (H-6-3)
18 Hazardous Waste Management Division
19 U.S. EPA, Region 9
20 75 Hawthorne Street
21 San Francisco, CA 94105
22 (415) 744-2236

23 Westinghouse hereby designates the following person as its
24 Project Coordinator who shall be responsible for overseeing the
25 implementation of this Consent Order:

26 Eric Manges
27 Project Manager
28 Environmental Affairs
29 Westinghouse Electric Corporation
30 11 Stanwix Street
31 Pittsburgh, PA 15222
32 (412) 642-3284

1
2 B. EPA and Westinghouse may change their respective Project
3 Coordinators. Such a change shall be accomplished by notifying
4 the other party in writing at least one week prior to the change.
5

6 C. The EPA Project Coordinator shall also have the
7 authority vested in the On-Scene-Coordinator ("OSC") by the NCP,
8 unless EPA designates a separate individual as OSC, in which case
9 both the EPA Project Coordinator and the OSC shall then have such
10 authority. This includes, but is not limited to, the authority
11 to halt, modify, conduct, or direct any tasks required by this
12 Consent Order and/or undertake any response actions (or portions
13 of the response action) when conditions present or may present a
14 threat to public health or welfare or the environment as set
15 forth in the NCP. If a Project Coordinator and separate OSC give
16 Westinghouse inconsistent instructions, then Westinghouse shall
17 follow the most recently given instruction and shall, as soon as
18 practicable, inform both the Project Coordinator and the separate
19 OSC of the inconsistency and the actions taken by Westinghouse.
20

21 D. The absence of the EPA Project Coordinator or OSC from
22 the Site shall not be cause for the stoppage of work.
23
24
25
26
27
28

VIII. SITE ACCESS

A. To the extent that Westinghouse requires access to land other than land it owns, Westinghouse will use its best efforts to obtain access agreements from the present owners or lessees within 60 days of the effective date of this Consent Order, or if the need for access to particular properties does not become evident to Westinghouse before the effective date of this Consent Order, then within 30 days of the date on which the need for such access becomes evident. The best efforts required under this Section shall include the payment of reasonable sums of money for access, consistent with the fair market value for such access or use. Such access agreements shall provide reasonable access for EPA, its contractors and oversight officials, the state and its contractors, and Westinghouse, its contractors, and its authorized representatives. In the event that Westinghouse is not able to obtain such access agreements, Westinghouse shall promptly notify EPA regarding both all efforts to, and the inability to, obtain, such access.

B. No conveyance of title, easement, or other interest in the property owned by Westinghouse comprising the Site shall be consummated without a provision permitting the continuous implementation of the provisions of this Consent Order.

C. Westinghouse shall permit EPA and its authorized representatives to have reasonable access to the Site to monitor the

1 Work. Nothing in this Consent Order shall be deemed to limit
2 EPA's authority under federal law to gain access to the Site.
3

4 IX. SAMPLING, ACCESS, AND DATA/DOCUMENT AVAILABILITY
5

6 A. Subject to any confidentiality rights and at the written
7 request and option of EPA, Westinghouse shall permit EPA or its
8 authorized representative to inspect and copy, or shall provide
9 EPA with copies of, all documents not presently in the posses-
10 sion, custody or control of EPA regarding hazardous substance
11 contamination at, or released from, the Site, including:

12 - The results of all sampling and/or tests or other techni-
13 cal data generated by Westinghouse or on Westinghouse's behalf
14 with regard to soil, ground water, surface water, or air con-
15 tamination by hazardous substances, pollutants, or other con-
16 taminants at the Site.

17 - Previous studies or reports;

18 - Communications between Westinghouse and local, state or
19 other federal authorities;

20 - Permits from local, state or federal authorities regard-
21 ing hazardous substances or contamination at the Site.
22

23 B. Upon the written request of EPA, which may consist of a
24 facsimile, at least one business day prior to any sample collec-
25 tion activity which occurs during and as a function of the Work,
26 Westinghouse shall provide split or duplicate samples to EPA or
27 its authorized representatives of any samples collected by Wes-
28

1 tinghouse as part of the RD Work Plan. Westinghouse shall
2 notify EPA of any planned sample collection activity in the
3 preceding monthly report.

4
5 C. Westinghouse shall either follow any approved Quality
6 Assurance Project Plan ("QAPP"), or to the extent such a QAPP
7 does not apply or does not specify the relevant procedures, Wes-
8 tinghouse shall use quality assurance, quality control, and chain
9 of custody procedures described in the relevant EPA guidances,
10 including the following documents, and any EPA updates or revi-
11 sions to these guidances, while conducting all sample collection
12 and analysis activities required by the Consent Order:

13
14 -Interim Guidelines and Specifications for Preparing
15 Quality Assurance Project Plans, December 1980,
16 QAMS-005/80

17
18 -Quality Assurance Program Plan for Region 9, Quality
19 Assurance Policies, Procedures and Management Systems,
20 December 1988, Document Control Number 9QA-01-89 (Formerly
21 QA009-008-09-88)

22
23 -Preparation of a U.S. EPA Region 9 Field Sampling Plan for
24 Private and State-Lead Superfund Projects, April 1990
25 (Document Control No. 9QA-06-89)

26
27 -US EPA Region 9 Guidance for Preparing Quality Assurance
28

1 Project Plans for Superfund Remedial Projects, September,
2 1989 (Document Control No 9QA-03-89)

3
4 -Laboratory Documentation Requirements for Data Validation,
5 January, 1990, Document Control No. 9QA-07-90

6
7 -Data Review Report Format, September 1989, Document Control
8 Number: 9QA-09-89

9
10
11 Westinghouse shall consult with EPA in planning for and
12 prior to, all sampling and analysis as detailed in the RD Work
13 Plan. To provide quality assurance and maintain quality control,
14 Westinghouse shall:

15
16 1. Use a laboratory which has a documented Quality As-
17 surance Program that complies with EPA guidance.

18
19 2. Upon the written request of EPA, Westinghouse shall
20 provide EPA with the QA/QC documentation of all sampling and
21 tests or other technical data generated by Westinghouse or on
22 Westinghouse's behalf with regard to soil, groundwater, surface
23 water, or air contamination by hazardous substances, pollutants,
24 or contamination at the Site in connection with the Work.

25
26 D. Westinghouse may assert a confidentiality claim, pur-
27 suant to 40 C.F.R. Part 2, covering part or all of the informa-

1 tion submitted to EPA pursuant to this Consent Order; provided,
2 however, that any information expressly exempted from confiden-
3 tiality protection by Section 104(e)(7)(F), shall not be con-
4 sidered confidential regardless of any such claim by Westin-
5 ghouse. Any information determined to be confidential by EPA in
6 accordance with CERCLA Section 104(e)(7)(F) and 40 C.F.R. Part 2
7 shall be afforded the protection specified therein.

8
9 E. If, at any time during the performance of the Work, Wes-
10 tinghouse becomes aware of the need for additional data beyond
11 the scope of the RD Work Plan which is necessary to properly com-
12 plete the RD, Westinghouse shall have an affirmative obligation
13 to submit to the EPA Project Coordinator within 20 days a
14 memorandum documenting the need for additional data.

15
16 F. Except for information that is afforded confidentiality
17 protection in accordance with Section IX.D above, all information
18 submitted to EPA by Westinghouse pursuant to this Consent Order
19 shall be subject to public inspection to the fullest extent per-
20 missible under any applicable federal law or regulation.

21
22 X. RECORD PRESERVATION

23
24 Westinghouse shall retain and preserve, for a period of ten
25 (10) years after the effective date of this Consent Order, all
26 records, documents and other information required to be prepared
27 in connection with the Work. After this ten year period, Westin-
28

1 ghouse shall notify EPA at least 30 days before the documents are
2 scheduled to be destroyed. If EPA requests that the documents
3 should be saved, Westinghouse shall, at no cost to EPA, provide
4 EPA with the documents or copies of the documents.

5 Westinghouse's failure to comply with any of the record preserva-
6 tion obligations in this Section shall be a violation of CERCLA
7 for which EPA may obtain statutory penalties and shall not be the
8 subject of stipulated penalties under this Consent Order.

9
10 XI. DISPUTE RESOLUTION
11

12 If Westinghouse objects to any EPA decision, pursuant to
13 this Consent Order, Westinghouse shall notify EPA in writing of
14 its objections within fourteen (14) calendar days of receipt of
15 the decision. EPA and Westinghouse will then have an additional
16 fourteen (14) calendar days from receipt by EPA of the notifica-
17 tion of objection to reach agreement. At the end of the fourteen
18 (14) day discussion period, EPA shall provide a written statement
19 of its decision by the Hazardous Waste Management Division Direc-
20 tor to Westinghouse. Westinghouse shall then implement EPA's
21 decision, unless EPA's decision is arbitrary, capricious, or
22 otherwise not in accordance with law. Use of the dispute resolu-
23 tion provision will not relieve Westinghouse's duty to complete
24 all tasks in a timely manner in accordance with the approved
25 schedule(s). This dispute resolution provision or EPA's decision
26 pursuant to this provision does not grant or imply jurisdiction
27 to any court to review EPA's decisions pursuant to this Consent
28

1 Order, nor does this provision limit the jurisdiction of any
2 Court under any applicable law.

3
4 XII. STIPULATED PENALTIES

5
6 A. Except with respect to any extensions allowed by EPA in
7 writing, or excused by the provisions of Section XIII (Force
8 Majeure), for each day in which Westinghouse fails to submit a
9 report or document, or in which Westinghouse otherwise fails to
10 comply with the requirements of this Order, Westinghouse agrees
11 to pay the sums set forth below as stipulated penalties. These
12 penalties shall accrue commencing upon the earliest of the fol-
13 lowing occurrences: Westinghouse's receipt of the written deter-
14 mination of disapproval, as specified in Section VI; the failure
15 of Westinghouse to meet the schedule specified or modified by EPA
16 in the RD Work Plan (Attachment A); or Westinghouse's receipt of
17 written notice from EPA that a violation of this Consent Order
18 has occurred. Stipulated penalties shall continue to accrue
19 through the final day of the correction of the noncompliance or
20 completion of the activity. The amounts set forth below shall
21 not be subject to challenge under Section XI of this Consent
22 Order (Dispute Resolution). Dispute Resolution shall not stay
23 the accrual of these stipulated penalties. EPA may in its
24 discretion waive stipulated penalties for any noncompliance or
25 determine that the amount of stipulated penalties demanded is
26 less than the maximum amount potentially payable by Westinghouse.

1 B. Class I noncompliance with the terms of this Consent Or-
2 der shall be defined as the failure to submit the Final Remedial
3 Design Report as required by the RD Work Plan or other approved
4 plans or schedules.

5
6 C. Class II noncompliance with the terms of this Consent
7 Order shall be defined as the the following:

8
9 1. Failure to submit any deliverable as required under this
10 Consent Order, with the exception of the Final Remedial Design
11 Report and Monthly Progress Reports,

12
13 2. Failure to perform the Work as specified in the RD
14 Workplan, or additional work required pursuant to Section VI
15 (Work to be Performed),

16
17 3. Failure to comply with any other requirements of this
18 Consent Order, with the exception of any failure that is defined
19 as Class I or Class III noncompliance.

20
21 D. For the purposes of this Consent Order, Class III non-
22 compliance with the terms of this Consent Order is defined as a
23 failure to submit Monthly Progress Reports as required by the RD
24 Workplan or other approved plans or schedules.

25
26 E. Stipulated penalties shall accrue in accordance with
27 the following schedule:

Class I Noncompliance Penalty Schedule

<u>Day</u>	<u>Penalty per Day</u>
1 - 7	\$10,000
8 - 14	12,000
15 - and beyond	15,000

Class II Noncompliance Penalty Schedule

<u>Day</u>	<u>Penalty per Day</u>
1 - 7	\$2,500
8 - and beyond	5,000

Class III Noncompliance Penalty Schedule

<u>Day</u>	<u>Penalty per Day</u>
1 - 10	\$ 500
11 - and beyond	1,000

F. Westinghouse's payment of stipulated penalties shall be due within thirty (30) days of a written demand by the Director, Hazardous Waste Management Division, U.S. EPA, Region 9, by certified check made payable to the United States Treasury and addressed to:

U.S. Environmental Protection Agency
Region 9, Attn: Superfund Accounting
P.O. Box 360863M
Pittsburgh, PA 15251

Westinghouse shall forward the check under cover of a transmittal letter which shall identify the Site by name as the "Westinghouse Superfund Site, Sunnyvale, California" and by the identification number "CAD001864081", and which shall make reference to this Consent Order. Westinghouse shall simultaneously send a copy of such check and transmittal letter to the EPA Project Coordinator.

1
2 G. The foregoing paragraphs A through F of this Section
3 (Stipulated Penalties) do not preclude EPA from pursuing any
4 other remedies or sanctions which are available to EPA in the
5 event of any failure by Westinghouse to comply with this Consent
6 Order.

7
8 XIII. FORCE MAJEURE
9

10 A. For purposes of this Consent Order, force majeure shall
11 be defined as any event arising from causes beyond the control of
12 Westinghouse, or its contractor, subcontractors, agents or con-
13 sultants acting on behalf of Westinghouse, which delays or
14 prevents the performance of any obligation under this Consent Or-
15 der, notwithstanding Westinghouse's best efforts to avoid the
16 delay. The requirement that Westinghouse exercise "best efforts
17 to avoid delay" includes using best efforts to anticipate any
18 potential force majeure event and best efforts to address the ef-
19 fects of any potential force majeure event (1) as it is occurring
20 and (2) following the potential force majeure event, such that
21 the delay is minimized to the greatest extent practicable.
22

23 B. Westinghouse shall have the burden of proving that the
24 delay claimed to be a force majeure was caused by circumstances
25 beyond the control of Westinghouse, its contractors, and agents
26 and that could not have been overcome by their due diligence.
27 Economic hardship, normal inclement weather, and increased costs
28

1 of performance shall not be considered events beyond the control
2 of Westinghouse, their contractors, and agents and shall not con-
3 stitute a force majeure. In the event of a force majeure, the
4 time for performance of the activity delayed by the force majeure
5 and any activity dependent on the delayed activity shall be ex-
6 tended only for the period of delay attributable to the force
7 majeure. Westinghouse shall adopt all reasonable measures to
8 avoid or minimize any delay caused by a force majeure.

9
10 C. When an event occurs or has occurred that may delay or
11 prevent the performance of any obligation under this Consent Or-
12 der, which Westinghouse believes is due to force majeure,
13 Westinghouse shall notify by telephone the EPA Project Coor-
14 dinator, or, in his/her absence, the Director of the Hazardous
15 Waste Management Division of EPA, Region 9, within 24 hours of
16 the commencement of such event. Oral notification shall be fol-
17 lowed by written notification, made within seven business days of
18 when Westinghouse knew or should have known of the event causing
19 the delay or anticipated delay. The written notification shall
20 fully describe: the reasons for the delay; the reasons the delay
21 is beyond the control of Westinghouse, its contractors, and
22 agents; the anticipated duration of the delay; actions taken or
23 to be taken to prevent or minimize the delay; a schedule for im-
24 plementation of any measures to be taken to mitigate the effect
25 of the delay; and any aspects of the event which may cause or
26 contribute to an endangerment to public health, welfare, or the
27 environment.

1 D. Failure of Westinghouse to comply with the requirements
2 of this Section XIII (Force Majeure) shall preclude Westinghouse
3 from asserting any claim of force majeure.
4

5 XIV. RESERVATION OF RIGHTS
6

7 A. Notwithstanding compliance with the terms of this Con-
8 sent Order, including the completion of an EPA approved Remedial
9 Design, Westinghouse is not released from any liability it may
10 have with respect to the Site. EPA reserves the right to take
11 any enforcement action pursuant to CERCLA and/or any other legal
12 authority with respect to Westinghouse and/or the Site, including
13 the right to seek injunctive relief, monetary penalties, and
14 punitive damages for any violation of law or this Consent Order.
15 EPA expressly reserves all rights and defenses that it may have,
16 including EPA's right both to disapprove of work performed by
17 Westinghouse and to request that Westinghouse perform tasks in
18 addition to those detailed in the RD Work Plan, as provided in
19 this Consent Order. EPA reserves the right to undertake removal
20 actions and/or remedial actions at any time, provided, however,
21 that EPA does not intend to conduct any portion of the Work, un-
22 less EPA determines that Westinghouse has violated this Consent
23 Order, or unless EPA determines that it is necessary for EPA to
24 do the Work or some portion thereof in order to respond to an
25 emergency. EPA reserves the right to seek reimbursement from
26 Westinghouse for such costs incurred by the United States.
27
28

1 B. EPA and Westinghouse specifically reserve all rights
2 that each of them have with respect to the other pursuant to the
3 Administrative Consent Order Docket No. 88-20 ("the RI/FS Consent
4 Order"). Nothing in this Consent Order shall in any way affect
5 Westinghouse's obligations under that RI/FS Consent Order.
6

7 C. Nothing in this Consent Order releases Westinghouse from
8 any obligation it may have to perform or to pay for any response
9 action at the Site.
10

11 XV. REIMBURSEMENT OF RESPONSE COSTS
12

13 A. Nothing in this Consent Order shall affect any existing
14 liability that Westinghouse has for payment of any EPA response
15 costs related to the Site. No more often than annually, EPA
16 shall submit to Westinghouse documentation for all response
17 costs, including oversight costs incurred by the United States
18 with respect to this Consent Order. EPA's Agency Financial
19 Management System Summary data (SPUR Reports) or an equivalent
20 summary shall serve as the documentation for payment demands.
21 Westinghouse shall, within 30 calendar days of receipt of each
22 payment demand, remit a check for the amount of the costs
23 demanded made payable to the Hazardous Substance Response Trust
24 Fund. This obligation is without prejudice to Westinghouse's
25 right to request all cost documentation to which it is entitled
26 pursuant to the Freedom of Information Act, 52 U.S.C. §552, as
27 amended. Checks should specifically reference the "Westinghouse
28

1 Superfund Site, Sunnyvale, California", and should be addressed
2 to:

3
4 U.S. Environmental Protection Agency
5 Region 9, Attn: Superfund Accounting
6 P.O. Box 360863M
7 Pittsburgh, PA 15251

8 A copy of the transmittal letter shall be sent simul-
9 taneously to the EPA Project Coordinator. EPA reserves the right
10 to bring an action against Westinghouse pursuant to Section 107
11 of CERCLA, 42 U.S.C. § 9607, for recovery of all response costs,
12 including oversight costs, incurred by the United States related
13 to this Consent Order and not reimbursed by Westinghouse as well
14 as any other unreimbursed past and future costs incurred by the
15 United States in connection with response activities conducted at
16 this Site.

17 B. Westinghouse may dispute any demand for payment by EPA in
18 accordance with the provisions of Section XI of this Consent Or-
19 der. (Dispute Resolution). Westinghouse need not pay any disputed
20 amount until EPA issues its decision concerning the dispute, at
21 which point Westinghouse will have 30 days to pay the amount re-
22 quired by EPA's decision, however, interest will accrue at the
23 rate specified in Section 107 of CERCLA on any unpaid amount
24 beginning 30 days after Westinghouse's receipt of the demand for
25 payment at issue.
26
27
28

XVI. OTHER CLAIMS

A. Except as provided herein, this Consent Order does not release Westinghouse from any claim, cause of action or demand in law or equity.

B. In entering into this Consent Order, Westinghouse waives any right to seek reimbursement or present any claim under Sections 106, 111, or 112 of CERCLA, 42 U.S.C. §§ 9606, 9611, or 9612, for any work performed pursuant to this Consent Order and any modifications thereto.

C. Westinghouse shall bear its own attorneys fees and costs with respect to all matters associated with this Consent Order.

XVII. OTHER APPLICABLE LAWS

Westinghouse shall undertake all actions required by this Consent Order in accordance with the requirements of all applicable local, state, and federal laws and regulations unless an exemption from such requirements is specifically provided in this Consent Order.

XVIII. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

A. Westinghouse is not, and shall not hold itself out to be, an agent or representative of the United States Government in

1 the performance of this Consent Order, and neither the United
2 States Government nor any agency thereof shall be considered a
3 party to any contract entered into by Westinghouse in the perfor-
4 mance thereof. Furthermore, notwithstanding any approvals which
5 may be granted by the United States or other government entities,
6 Westinghouse agrees to indemnify and hold the United States
7 Government, its agencies, departments, agents, contractors, and
8 employees, harmless from any and all claims or causes of action
9 arising from or on account of acts or omissions of Westinghouse,
10 its officers, employees, receivers, trustees, agents, or assigns,
11 in carrying out the activities pursuant to this Consent Order.

12
13 B. The United States is, to the extent allowed by law,
14 responsible for any injury or loss to persons or property
15 proximately caused by an act or omission of the United States or
16 its employees, agents, contractors, and subcontractors.

17
18 XIX. COMMUNITY RELATIONS/PUBLIC COMMENT

19
20 EPA will implement a Community Relations Program in accor-
21 dance with Agency policies, guidance documents, and public com-
22 ment policy. Westinghouse is required to provide a representa-
23 tive to respond to community questions concerning the Work at any
24 meeting held by EPA in connection with the Work performed under
25 this Consent Order. As requested by EPA, Westinghouse shall
26 cooperate with EPA in providing information to the public and
27 shall participate in the preparation of appropriate information

1 disseminated to the public and in public meetings which may be
2 held or sponsored by EPA to explain activities at or concerning
3 the Site. Further, Westinghouse shall cooperate with EPA in ef-
4 forts to notify community members of anticipated drilling of
5 wells in neighborhoods surrounding the Site.

6
7 XX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION
8

9 A. This Consent Order is effective on the date signed by
10 EPA.
11

12 B. No informal advice, guidance, suggestions, or comments
13 provided by EPA regarding reports, plans, specification,
14 schedules, or any other writing submitted by Westinghouse shall
15 be construed as relieving Westinghouse of its obligation to ob-
16 tain such formal approval as may be required by this Consent Or-
17 der, except to the extent that such obligation is expressly
18 waived or altered in writing.
19

20 C. Any deliverables, plans, technical memoranda, reports
21 (other than progress reports), specifications, schedules and at-
22 tachments required by this Consent Order are, upon approval by
23 EPA, incorporated into this Consent Order by this reference. Any
24 non-compliance with such EPA approved reports, plans, specifica-
25 tions, schedules, and attachments shall be considered a failure
26 to achieve the requirements of this Consent Order and may subject
27 Westinghouse to the penalties set forth in Section XII
28

1 (Stipulated Penalties).

2
3 XXI. PARTIES BOUND
4

5 This Consent Order shall apply to and be binding upon Wes-
6 tinghouse and EPA, their agents, successors, and assigns. No
7 change in ownership or corporate or partnership status will alter
8 Westinghouse's obligations under this Consent Order. The sig-
9 natories to this Consent Order certify that they are authorized
10 to execute and legally bind the parties they represent to this
11 Consent Order. Westinghouse shall provide a copy of this Consent
12 Order to all contractors, sub-contractors, laboratories, and con-
13 sultants retained to conduct any portion of the Work performed
14 pursuant to this Consent Order within 14 calendar days of the ef-
15 fective date of this Consent Order or date of such retention,
16 whichever occurs later. Westinghouse shall provide a copy of
17 this Consent Order to any subsequent owner(s) or successor(s)
18 before ownership rights are transferred.
19

20 XXII. NOTICE TO THE STATE
21

22 EPA is notifying the State of California pursuant to the re-
23 quirements of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), by
24 providing the State a copy of this Consent Order and the RD Work
25 Plan.
26
27
28

1 XXIII. TERMINATION AND SATISFACTION

2

3 Except for any obligations imposed upon Westinghouse by Sec-

4 tion X (Record Preservation), Section XII (Stipulated Penalties)

5 and Section XV (Reimbursement of Response Costs) of this Consent

6 Order, the provisions of the Consent Order shall be deemed

7 satisfied upon Westinghouse's receipt of written notice from EPA

8 that Westinghouse has demonstrated, to the satisfaction of EPA,

9 that all of the terms of this Consent Order, including any addi-

10 tional tasks which EPA has determined to be necessary, have been

11 completed.

12

13

14

15

16

17 IT IS SO AGREED AND ORDERED:

18 UNITED STATES

19 ENVIRONMENTAL PROTECTION AGENCY

20 By: David B. Jones Date: 2/6/92

21 Jeff Zelikson

22 Director, Hazardous Waste Management Division

23 Region 9

24 RESPONDENT

25 WESTINGHOUSE ELECTRIC CORPORATION

26 By: Jack W. Fisch Date: 1/28/92

27 Jack W. Fisch

28 Manager, Corporate Environmental Affairs